No. 77-1548

In the Supreme Court of the United States

OCTOBER TERM, 1977

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL NO. 3, PETITIONER

v.

SIEBLER HEATING & AIR CONDITIONING, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Respondents are a group of nine companies in the Omaha, Nebraska, area specializing in residential air conditioning and sheet metal work. Until 1974, eight of the companies were members of a multi-employer bargaining association of similar companies in the Omaha area, although a majority of the companies in the association specialized in commercial rather than residential work (Pet. App. 4, 20-21, 45-46).

In 1974, during the course of negotiations between petitioner and the multi-employer bargaining association, the eight respondent members withdrew from the association and refused to be bound by any collective-bargaining agreement reached by petitioner and the

association.[1] Petitioner filed charges with the National Labor Relations Board, alleging that the respondents' withdrawal from the association in the midst of bargaining and their subsequent conduct constituted unfair labor practices (Pet. App. 4-14).

The respondents contended that their withdrawal from the multi-employer bargaining association was justified by "unusual circumstances" because, according to respondents, the association had made a commitment to seek a favorable differential wage scale for residential as opposed to commercial work, and it had breached that commitment (Pet. App. 20-21). The Administrative Law Judge, whose decision was adopted by the Board, rejected this defense, finding that no such commitment had been made and that respondents had not been treated unfairly by the multi-employer bargaining association (Pet. App. 23-24). Accordingly, the Board found that eight of the respondents violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (as amended, 61 Stat. 140, 141, 29 U.S.C. 158(a)(1) and 158(a)(5)) by making an untimely withdrawal from the multi-employer bargaining unit (Pet. App. 24-25). The Board also found that each of the respondents violated Sections 8(a)(1) and 8(a)(3) of the Act by locking out employees when petitioner did not negotiate with a new multi-employer bargaining association (Pet. App. 25). Finally, the Board found that three of the respondents violated Sections 8(a)(1) and 8(a)(5) of the Act by unilaterally changing employees' job classifications and reducing employees' wage rates (Pet. App. 26).

2. The court of appeals denied enforcement of the Board's order. The court apparently agreed with the legal propositions that underlay the Board's analysis—that

[1]The ninth respondent, Frazier-Schurkamp, Inc., had been a member of the association, but it withdrew in 1973 (Pet. App. 4, 46).

dissatisfaction with the results of group bargaining does not justify an untimely withdrawal, and that an employer "cannot remain in a multi-employer unit as long as he believes it is to his advantage to do so and then withdraw when he concludes he can do better by himself" (Pet. App. 54).[2] Assessing the facts differently from the Board, however, the court of appeals concluded that the multi-employer bargaining association abrogated a commitment to the respondent residential contractors to seek a more favorable residential wage rate in the 1974 bargaining negotiations (Pet. App. 53). This broken commitment, the court held, constituted "unusual circumstances" sufficient to justify the respondents' withdrawal from the multi-employer unit. The court explained that in its view the majority commercial contractors had acted in their own interests and had not represented the respondent residential contractors fairly. According to the court, "the majority made only a feeble effort to protect the respondents' interests and threw in the towel at the first sign of opposition" (Pet. App. 54).[3]

[2]These propositions are well established in both Board and court precedents. In *Retail Associates, Inc.*, 120 N.L.R.B. 388, 393-395, the Board held that, once negotiations in an established multi-employer bargaining unit have begun, none of the employers in the unit may withdraw from those negotiations without the union's consent, unless the untimely withdrawal is justified by unusual circumstances. See also *National Labor Relations Board* v. *Central Plumbing Co.*, 492 F. 2d 1252, 1254 (C.A. 6); *National Labor Relations Board* v. *Johnson Sheet Metal, Inc.*, 442 F. 2d 1056, 1059 (C.A. 10); *National Labor Relations Board* v. *Dover Tavern Owners' Association*, 412 F. 2d 725, 728 (C.A. 3); *National Labor Relations Board* v. *John J. Corbett Press, Inc.*, 401 F. 2d 673, 675 (C.A. 2).

[3]The Board has held that genuine economic distress may privilege withdrawal from a multi-employer bargaining unit. See, *e.g.*, *Atlas Electrical Service Co.*, 176 N.L.R.B. 827, 830; *Spun-Jee Corp.*, 171 N.L.R.B. 557, 558; *U.S. Lingerie Corp.*, 170 N.L.R.B. 750, 751. The Board agrees with petitioner that on the record here respondents did not establish that such distress would result if they remained in the

3. The Board believes that substantial evidence supports its findings that the multi-employer bargaining association did not breach any commitment to respondents or fail fairly to represent the respondents' interests in the negotiations with petitioner. The Board did not file its own petition for certiorari, however, because, in the Board's view, the court of appeals' contrary conclusion presents only an evidentiary issue, which does not ordinarily warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490. Should the Court grant the petition, however, the Board will defend it order.

Respectfully submitted.

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multi-employer unit. The Board, however, does not read the court of appeals' decision as holding that respondents' economic circumstances would have privileged their withdrawal here even if the multi-employer bargaining association had not breached a specific promise concerning the negotiation of wage rates. See Pet. App. 55-56.

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